APPEAL - 632

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR D MOSSENSON (CHAIRPERSON)

APPELLANT:	**KEVIN ALAN NOLAN**
APPLICATION NO:	**A30/08/632**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR J PRIOR (MEMBER)** **MR R NASH (MEMBER)**
DATE OF HEARING:	**28 APRIL 2005**
DATE OF DETERMINATION:	**18 MAY 2005**

IN THE MATTER OF an appeal by Kevin Alan Nolan against the determination made by the Racing and Wagering Western Australia Stewards of Harness Racing on 2 February 2005 imposing a 12 month disqualification for breach of Rule 190(2) of the Rules of Harness Racing.

Mr D Sheales appeared for the Appellant.

Mr R J Davies QC appeared for the Racing and Wagering Western Australia Stewards of Harness Racing.

I have read the draft reasons of Mr Prior, Member.

I agree with those reasons and conclusion and have nothing to add.

Seal of the Racing Penalties Appeal Tribunal of WA

Da Mossenson

DAN MOSSENSON, CHAIRPERSON

APPEAL - 632

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR R J NASH (MEMBER)

APPELLANT:	**KEVIN ALAN NOLAN**
APPLICATION NO:	**A30/08/632**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR J PRIOR (MEMBER)** **MR R NASH (MEMBER)**
DATE OF HEARING:	**28 APRIL 2005**
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IN THE MATTER OF an appeal by Kevin Alan Nolan against the determination made by the Racing and Wagering Western Australia Stewards of Harness Racing on 2 February 2005 imposing a 12 month disqualification for breach of Rule 190(2) of the Rules of Harness Racing.

Mr D Sheales appeared for the Appellant.

Mr R J Davies QC appeared for the Racing and Wagering Western Australia Stewards of Harness Racing.

I agree with the member, Mr Prior, that this appeal should be dismissed and I agree with his reasons for determination. I make the following brief additional comments.

The Stewards are reposed with the primary exercise of discretion in respect of the imposition of penalties. When considering penalties imposed by the Stewards this Tribunal has always paid due respect to the fact that the Stewards are a professional specialist body within the industry whose judgment and exercise of discretion will not be lightly interfered with.

I am not persuaded that the Appellant has affirmatively established that there was an error in the exercise by the Stewards of their discretion in imposing a 12 month disqualification on the Appellant in all the circumstances of this case.

ROBERT NASH, MEMBER

Seal of the Racing Penalties Appeal Tribunal of W.A.

APPEAL - 632

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR J PRIOR (MEMBER)

APPELLANT:	**KEVIN ALAN NOLAN**
APPLICATION NO:	**A30/08/632**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR J PRIOR (MEMBER)** **MR R NASH (MEMBER)**
DATE OF HEARING:	**28 APRIL 2005**
DATE OF DETERMINATION:	**18 MAY 2005**

IN THE MATTER OF an appeal by Kevin Alan Nolan against the determination made by the Racing and Wagering Western Australia Stewards of Harness Racing on 2 February 2005 imposing a 12 month disqualification for breach of Rule 190(2) of the Rules of Harness Racing.

Mr D Sheales appeared for the Appellant.

Mr R J Davies QC appeared for the Racing and Wagering Western Australia Stewards of Harness Racing.

SMART AS trained by Mr Nolan raced at Gloucester Park on 10 January 2005. The Racing Chemistry Laboratory in Perth reported a TCO_2 level of 37.9 millmoles per litre in a pre-race blood sample taken from the pacer. That value was subject to an uncertainty of measurement of ± 1.2 millmoles per litre. The Australian Racing Forensic Laboratory in New South Wales reported the TCO_2 level to be 38.8 millmoles per litre in the control portion of the sample. That value was also subject to an uncertainty of measurement of ± 1.2.

An inquiry was held by the Stewards on 2 February 2005. Evidence was given by Mr G Mackintosh, RWWA Racing Investigator, Mr C Russo, Manager, Racing Chemistry Laboratory, Dr J Medd, RWWA Official Veterinarian and Dr B Stewart, Veterinarian assisting Mr Nolan. Mr Nolan also gave evidence as to his feeding regime.

At T30 the Chairman of the Inquiry read Rule 190(1) and (2) of the Rules of Harness Racing to Mr Nolan and announced the charge as follows:

> *'The charge being that you, Mr K. Nolan, a licensed trainer, presented SMART AS to race at Gloucester Park on January the 10th 2005 with a level of TCO_2 in excess of 36 millimoles per litre in plasma.'*

Rule 190(1) and (2) states:

> ***'190. Presentation free of prohibited substances***
>
> *(1) A horse shall be presented for a race free of prohibited substances.*
>
> *(2) If a horse is presented for a race otherwise than in accordance with sub rule (1) the trainer of the horse is guilty of an offence.'*

Earlier, the Chairman had read into the inquiry part of Local Rule 188A (which deals with prohibited substances) as follows:

> *'(2) The following substances when present at or below the levels set out are excepted from the provisions of sub rule (1) (G.G. 9th August 2002)*
>
> *(a) Alkalinising Agents, when evidenced by total carbon dioxide (TCO_2) present at a concentration of 36 millimoles per litre in plasma.'*

Mr Nolan pleaded guilty to presenting the horse but not guilty to administration.

The inquiry proceeded on a plea of guilty and submissions were elicited from the Appellant in respect to penalty.

At T39 – 40 The Chairman announced the penalty to be meted out in these terms:

> *'Mr Nolan, the Stewards have considered the matter of penalty, taking into account your submissions and Dr Stewart's. The Stewards see this matter as a serious breach of the Rules.*
>
> *Time and again Stewards have been dealing with positive swab cases and maintain any breach of the drug rules brings the racing industry into disrepute and tarnishes the image of the sport. The racing industry is dependent on the betting public's support and any damage to the integrity of the industry, impacts negatively on it.*
>
> *Excessive levels of TCO_2 in a racehorse effects a horse's system by inhibiting fatigue during a race. A level of TCO_2 above 36 millimoles per litre can be described as potentially performance enhancing. That places this breach in the serious offence category.*

We're also mindful of remarks made by the Tribunal in the Wolfe matter and whilst acknowledging that that was a different substance, the principle that the Tribunal put forward, is taken into account by the Stewards. I'll read the determination in part.

"Any breach of the rules involving prohibited substance whether in the course of racing or trialling is a very serious matter. There is a need to impose an appropriate punishment on the offender as part of the overall control of the industry. Stewards when sentencing must also be mindful of the message being conveyed to the other professional participants in the industry as well as that of the punter. As part of enforcing the Rules and applying racing's drug-free policy, the Stewards would be derelict in their duty in the sentencing process and arriving at a penalty, if they failed to draw attention to the potential adverse consequences and risks associated with the introduction of prohibited substances to horses under the care of the trainer."

The Stewards in arriving at a penalty see a need to send a clear message to the industry that presenting horses to race with a prohibited substance in their system is totally unacceptable. The penalty must encompass a general deterrent factor.

In regards to your record, in 1999, you had a previous charge of presenting a horse with an elevated level of TCO_2. You were disqualified for 12-months by the Stewards, however, this was varied by the Western Australian Trotting Association Committee to three-months suspension and a $5,000 fine. You appealed that penalty but it was dismissed.

Further, you faced a Stewards' inquiry in regards to the pacer BACK AT YEA in 2004. That horse also recorded an elevated level of TCO_2 with confirmatory analysis being at 36 millimoles per litre corrected. At that time, you were made well aware of your obligations in relation to TCO_2.

Also, this panel accepts that the Chief Steward, Mr Delaney, did speak to you in early January in relation to elevated TCO_2 levels.

Harness Racing Stewards have in the past disqualified and fined trainers for elevated levels of TCO_2.

The WATA Committee did introduce a local rule allowing, under certain circumstances, for a fine or a suspension in lieu of a disqualification. However, this provision was rescinded on the 1st of August 2004 by RWWA.

Penalties in thoroughbred racing for elevated TCO_2 levels, result in disqualifications from three-months upwards. In this case the Stewards have considered the options of a fine, suspension or disqualification. The Stewards have taken into account your personal circumstances and we acknowledge your guilty plea.

After considering all factors, Mr Nolan, the Stewards believe that you should be disqualified for a period of 12-months effective immediately.'

Mr Nolan sought a stay of proceedings. That request was refused by the Chairperson.

The only ground of appeal is against the severity of the penalty.

Reasons

Counsel for the Appellant at the hearing of this appeal conceded that the only appropriate penalty in the circumstances of the Appellant's case was a disqualification. He also conceded, in the circumstances, the range of penalty available should have been 6-9 months disqualification.

Given the serious nature of this type of breach of the rules and given this was a second offence, such concessions were appropriately made.

It was submitted that the disqualification for a period of 12 months was inappropriate and the Appellant, through his counsel at the hearing of the appeal, relied generally on two aspects of appeal, which can be summarised as follows:

1. The penalty of 12 months disqualification was imposed in error, in that the Stewards took into account an irrelevant consideration, that being they considered the Appellant's previous warnings by Stewards as to heightened TCO_2 readings of his horses and also, a previous hearing before the Stewards where the Appellant was not convicted, as aggravating factors.

2. The penalty of 12 months was manifestly excessive in all the circumstances.

As to the first aspect, the Appellant submitted that as the Stewards had as part of their reasons for imposing the penalty referred to the inquiry concerning the pacer BACK AT YEA in 2004 and also, the discussions with the Chief Steward, Mr Delaney in early January 2005, immediately after referring to the Appellant's previous conviction in 1999, that suggested that the Stewards fell into error by considering those circumstances as aggravating factors.

I agree with the general submission by the Appellant's counsel that if such matters were considered as aggravating circumstances, the Stewards would have fallen into error in imposing the penalty they did, because they were not previous convictions for breach of the relevant rule or the equivalent previous Local Rule.

Counsel for the Stewards submitted in response to this submission, that the reason such comments appear in the Stewards' reasons for decision does not indicate they considered these matters as an aggravating factor, but merely appear in the records of reason for decision as a response to matters raised by the Appellant in the inquiry that he was not aware of any concerns as to elevated TCO_2 readings of his horses in recent times.

Although at the inquiry initially there was initially a debate between the Appellant and the Stewards as to the context of his discussions between the Appellant and Chief Steward Mr Delaney, it was later conceded that there was in fact such a discussion and it did relate to TCO_2 readings.

I am not satisfied, having considered the transcript of the inquiry and then considered it in the context of the Stewards' reasons of decision that these comments, in the reasons for decision, are such that I can be satisfied that the Stewards treated these matters as aggravating circumstances and fell into error.

As to the second aspect of appeal, it was submitted by counsel for the Appellant that because of the change in Western Australia from the previous Local Rule, being Rule 55A to

the now Australian Rule 190, there is a limited amount of previous decisions which assist in giving an indication to the industry of the tariff of penalties available for these type of rule breaches. In this respect, the Appellant also referred to a previous decision of this Tribunal under the previous Local Rule 55A, being Bratovich Appeal 597 and a decision of the Victorian Racing Appeals Tribunal, being Burnett Appeal No. 29 of 2004.

Counsel for the Appellant further urged that because of the paucity of previous decisions of this Tribunal in relation to offences of this nature as to penalties, that this appeal was an appropriate vehicle for this Tribunal to make some relevant comments about what was the appropriate penalty.

I have given consideration to the two decisions referred to above and am satisfied there are considerable distinguishing factual circumstances in both of those decisions which do not assist me greatly in considering whether the penalty imposed by the Stewards of 12 months disqualification, in the circumstances of this case, was manifestly excessive.

I am further satisfied that in the factual circumstances of this matter, it is difficult to give weight to the submission that this is an appropriate matter for this Tribunal to give some guidance as to what the appropriate penalty is for offences of this nature.

In my opinion, the penalty imposed of 12 months for the length of disqualification was directly reflective of the individual factual circumstances of this matter, in particular the fact that the Appellant was a second offender, the materials that were found at his training facilities and also, the evidence in relation to his training regimes and therefore the possibility of this horses receiving elevated TCO_2 readings above the allowable level.

In dismissing this aspect of the appeal, I am mindful of what has been previously said on many occasions in this Tribunal, for a penalty to be manifestly excessive, in the circumstances, it needs to be so manifestly excessive to demonstrate an error. In this matter, it has been conceded by counsel for the Appellant, from the outset, that in the circumstances that a penalty of 6-9 months disqualification was appropriate.

In those circumstances, I am unable to be satisfied that a 12 month length of disqualification was manifestly excessive.

For all the above reasons, I would dismiss the appeal.

John Prior

JOHN PRIOR, MEMBER

Seal of the Racing Penalties Appeal Tribunal of W.A.